

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

JERRY JEROME WARFIELD, #1146892 §
VS. § CIVIL ACTION NO. 9:06cv95
DIRECTOR, TDCJ-CID §

ORDER OF DISMISSAL

The above-styled and numbered civil action was referred to United States Magistrate Judge Judith K. Guthrie, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed as time-barred. The Petitioner has filed objections.


The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Petitioner to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and the objections of the Petitioner are without merit.

The Petitioner's objections clarify the facts of the case. He filed an application for a writ of habeas corpus in state court on June 18, 2004, which was denied on October 20, 2004. He filed a motion for reconsideration/rehearing on November 22, 2004. In his objections, he submitted a copy of a "white card" from the Texas Court of Criminal Appeals noting that the motion would not be entertained. The "white card" is dated September 16, 2005. He asserted that he did not actually receive the "white card" until March 31, 2006. He argued that the pendency of the motion should have tolled the deadline, but the Report and Recommendation correctly noted that the Fifth Circuit has held that the pendency of a motion for rehearing/reconsideration tolls the deadline only if the Texas Court of Criminal Appeals had, in fact, considered the motion. *Lookingbill v. Cockrell*, 293 F.3d 256 (5th Cir. 2002), *cert. denied*, 537 U.S. 1116 (2003). The *Lookingbill* decision was

established published case law before the Petitioner ever filed his application for a writ of habeas corpus in state court, and this Court is obligated to follow to the decision. The objections lack merit. Therefore the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. All motions by either party not previously ruled on are hereby **DENIED**. A certificate of appealability is **DENIED**.

SIGNED this the 17 day of **May, 2006**.


Thad Heartfield
United States District Judge